Supreme Court, U.S.
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No. 93-81

In The

# Supreme Court of the United States

October Term, 1993

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SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

JOHN J. HART,
*Petitioner,*

v.

STOCKMAR ENERGIE, INCORPORATED,
d/b/a/ L.F.C. Power Corporation,
*Respondent.*

**Petition For A Writ Of Certiorari**
**To The Superior Court Of The State Of California**
**In And For The County Of Sacramento**
**Appellate Department**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. May an employee's claim of violation of his rights under Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. § 157, be heard for the first time on petition for certiorari, when this claim was never pressed or passed on below?

2. May the State of California, through Labor Code § 229, require an employee whose terms and conditions of employment are established by a collective bargaining agreement, which contains an arbitration clause, to pursue his wage and penalty claims through collectively bargained arbitration before resorting to administrative or civil litigation?

3. Is the state's assessment of a monetary penalty against an employer for "willfully" breaching a collective bargaining agreement preempted by Section 301(a) of the Labor Management Relations Act, 29 U.S.C. Section 185(a); the Garmon Rule stated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); and/or the Machinists' Doctrine as enunciated in *Machinists v. Wisconsin Employment Relations Commission*, 417 U.S. 132 (1976)?

## LIST OF PARTIES

Respondent agrees with Petitioner's statement except that Respondent's correct name is: Stockmar Energy Corporation (d/b/a LFC Power Systems Corporation).[1]

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[1] Respondent is a wholly owned subsidiary of LFC Energy Corporation. LFC Energy Corporation is a majority-owned subsidiary of LFC Financial Corp. LFC Financial Corp. is a wholly owned subsidiary of Cawsl Enterprises, Inc., which is a wholly owned subsidiary of Cawsl Corp.

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## BRIEF IN OPPOSITION

## OPINIONS BELOW

Respondent agrees with the statement set forth in the Petition.

## JURISDICTION

Respondent does not disagree that this case is generally subject to 28 U.S.C. § 1257. However, as discussed herein, Respondent contends that the question presented by Petitioner was not raised in the courts below, and

therefore cannot be raised for the first time by Petition for Certiorari.

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the statutes cited by Petitioner, 8 Cal. Code Reg. § 13520 provides:

> **§ 13520. Definition of "Willful."**
>
> A willful failure to pay wages within the meaning of Labor Code Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203.
>
> (a) Good Faith Dispute. A "good faith dispute" that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist. Defenses presented which, under all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a "good faith dispute."

## SUPPLEMENTAL STATEMENT OF THE CASE

Respondent states the following additional facts and corrections to the Statement of the Case presented by Petitioner:

1. At all times during his employment with Respondent LFC, Petitioner was covered by a collective bargaining agreement containing an arbitration clause, which governed the terms and conditions of his employment. Petitioner's App. 1a-2a.

2. Upon his termination from employment, Petitioner, through his Union, filed a grievance wherein he requested one hour overtime pay (consisting of two one-half-hour periods), safety bonus compensation, reinstatement and backpay, and "penalty pay under Federal and State law." Declaration of Ed Stuart in Support of Motion for Summary Judgment (App. 1a-4a hereto).

3. The underlying overtime dispute arose out of Hart's claim that pursuant to the terms of the collective bargaining agreement, he was entitled to, and earned, overtime which was not reflected in his final paycheck. Petitioner's App. 5a. Hart did not inform his supervisors that he had worked any overtime during the week in question, Petitioner's App. 2a, and conflicting evidence was presented at trial on the issue of whether he was ever authorized to work the claimed overtime and whether his employer knew about it. Petitioner's App. 2a, 5a-7a. Therefore, at the time of Petitioner's termination, Respondent disputed that any additional wages for overtime were due under the terms of the collective bargaining agreement, and paid him for all hours worked, except for the disputed overtime. Petitioner's App. 2a.

4. The parties resolved Petitioner's entire claim through the grievance procedures established in the collective bargaining agreement. Thus, two weeks after his employment ended, Petitioner, through his union representative, presented a written grievance to Respondent claiming, *inter alia*, overtime wages and all applicable penalties under state and federal law. Petitioner's App. 2a. Two weeks later, the union representative and representatives of Respondent met to discuss the grievance. *Id.* Four days later, Respondent paid Petitioner Twenty Seven and $^{38}/_{100}$ Dollars ($27.38) for the claimed overtime, but declined to pay any penalties. *Id.* According to Business Agent Ed Stuart: "All of these issues were discussed, and it was concluded that the company owed Mr. Hart approximately $37 [sic $27] to fully and completely resolve all the issues that arose in the grievance." App. 1a.

5. Petitioner did not pursue his grievance any further, although the collective bargaining agreement provided for additional procedures, including arbitration. Petitioner's App. 2a and 3a. Moreover, other than filing an action in municipal court under the California Labor Code, he did not protest the handling of his grievance either by filing charges with the National Labor Relations Board (NLRB) under Section 8(a)(5) or Section 8(b)(1)(A) of the National Labor Relations Act (NLRA), as amended, 29 U.S.C. §§ 158(a)(5), 158(b)(1)(A), or by filing a federal court action under Section 301 of the NLRA, 29 U.S.C.

§ 185, alleging any improper conduct by either Respondent or his union.[2]

6. The trial court concluded that the federal and state penalties sought by Petitioner in his written grievance were not included or excluded by the collective bargaining agreement. Petitioner's App. 3a. Thus, the court did not reach the issue of whether or not Petitioner could have obtained penalties under California Labor Code § 203 through the grievance process. In fact, Section II.5 of the collective bargaining agreement provides:

> Nothing in this Agreement either by its statement or omission shall serve as a means to eliminate the protection or rights as guaranteed to the employees and to the UNION by the applicable Federal and State statutes, Codes and Regulations.
>
> Defendant's Trial Exhibit "A."

7. At no time during any of the proceedings below did Hart ever assert that his rights under Section 7 of the NLRA, 29 U.S.C. § 157, would be violated if he were denied state law relief based upon either California Labor Code § 229 or § 301 of the NLRA. Instead, the proceedings below addressed only the issue of whether his claim

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[2] The trial court found that Petitioner did file a charge with the NLRB to enforce the state penalties, over which the NLRB declined jurisdiction. Petitioner's App. 3a. In fact, the only NLRB charge filed by Hart consisted of a charge filed under § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), alleging discriminatory failure to pay a safety bonus, which was dismissed by the NLRB. Complaint, paragraph 15 and Exhibit "C" thereto.

was barred under either state law or federal preemption grounds.[3]

## REASONS FOR DENYING THE WRIT

### I. PETITIONER FAILED TO RAISE BELOW THE ISSUE OF WHETHER APPLICATION OF FEDERAL PREEMPTION PRINCIPLES DENIED HIM RIGHTS GUARANTEED UNDER SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT

As a prerequisite to Supreme Court jurisdiction under 28 U.S.C. § 1257, Petitioner has the burden of establishing that the issue upon which he seeks review was raised in the state court. *Clark v. Jeter,* 486 U.S. 456, 459-60 (1988). Thus, it is the practice of this Court not to decide federal claims that were not "pressed or passed upon" by the courts below. *Id.* at 459; *Banker's Life and Casualty Co. v. Crenshaw,* 486 U.S. 71, 79-80 (1988).[4] In order to establish that an issue has been properly raised below, " '[a]t the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance

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[3] The fact that Hart may have quoted from *Metropolitan Life Insurance Co. v. Commonwealth of Massachusetts,* 471 U.S. 724, 756 (1985) in his brief on appeal to the Superior Court, Petitioner's Brief at 6, does not amount to raising this issue, which was never ruled on by the Superior Court.

[4] In *Banker's Life,* this Court declined to decide whether this rule is jurisdictional, but concluded that prudence requires that review of such cases be denied. 486 U.S. at 79.

of the federal claim at the time and in the manner required by the state law.' " *Id.* at 77-78 (citing *Webb v. Webb*, 451 U.S. 493, 501 (1981) (emphasis in *Bankers Life* Decision). Accordingly, a federal claim or right which was never specifically made or asserted in state court cannot be said to have been denied by a state court judgment which does not refer to it. *Id.* at 78 and note 2 (citing *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899)).

*Clark v. Jeter* is closely analogous to the present case. There, the plaintiff asserted on petition for certiorari to this Court that a state statute of limitations for maintaining an action to establish paternity was preempted by federal law. However, while arguing generally that the state statute applied by the state court was invalid, the plaintiff did not raise the federal preemption challenge in her arguments to the state court. Therefore, this Court refused to consider the preemption argument.[5] Similarly, Petitioner has framed the issue in this case as whether the Superior Court, Appellate Department, deprived Petitioner of rights guaranteed under Section 7 of the NLRA, 29 U.S.C. § 157. However, this claim was never raised by Petitioner below, and thus cannot be raised for the first time on a Petition for Certiorari before this Court.

The proceedings before the Superior Court involved the single issue, raised by Respondent, of whether Petitioner's claim for penalties under state law was barred under state law and preempted by § 301 and other aspects of the NLRA. At no time did Petitioner ever

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[5] The Court did, however, reverse the state court's ruling on equal protection grounds. 486 U.S. at 463.

assert that application of California Labor Code § 229 to this case would deprive him of federal rights under the NLRA.[6] Nothing in either the trial court or the appellate court decisions addresses this issue. Accordingly, the requirements for jurisdiction under 28 U.S.C. § 1257 have not been met and the Petition should be denied.

## II. THIS COURT SHOULD NOT INVOLVE ITSELF IN INTERPRETING AND APPLYING A VALID STATE LAW STANDARD WHICH DOES NOT REQUIRE RESOLUTION OF ANY FEDERAL QUESTION

Under California law, an employee who proves that he did not receive all wages due and owing to him upon termination is not automatically entitled to recover penalties under California Labor Code § 203. Instead, only a "willful" failure to pay wages is subject to penalties. Pursuant to 8 Cal. Code Reg. § 13520, no penalties may be assessed in the event of a "good faith" dispute that the wages are due. Thus, in determining whether to assess penalties, the court must evaluate the employer's subjective good faith in failing to pay the wages claimed.

Contrary to Petitioner's assertion, Labor Code § 229 does not necessarily bar all claims by employees covered by a collective bargaining agreement, but only those

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[6] Thus, this case is readily distinguishable from *Livadas v. Aubry*, 749 F. Supp. 1526 (N.D. Cal. 1990), *rev'd.*, 943 F. 2d 1140 (9th Cir. 1991), *amended*, 978 F.2d 552 (9th Cir. 1993), *Petition for Certiorari filed*, 61 U.S.L.W. 3836 (U.S. June 3, 1993) (No. 92-1920), in which this issue, framed as a claim under 42 U.S.C. § 1983, was expressly raised and ruled upon by both the District and Circuit Courts.

claims which require interpretation and application of the agreement and which are subject to arbitration. For example, in *Livadas v. Aubry*, it is possible that no interpretation or application of the collective bargaining agreement was required since the employer apparently did not dispute the employee's wage claim, 749 F. Supp. at 1528, 943 F.2d at 1141. In this case, however, Respondent disputed that Petitioner had worked the overtime he claimed, and paid the wages claimed only as a settlement of a grievance. Thus, under California Labor Code § 229 and 8 Cal. Code Reg. § 13520, the court would have had to analyze the collective bargaining agreement and evaluate Respondent's handling of the grievance in order to determine whether it acted in "good faith" in disputing the wage claim. The Superior Court correctly concluded that a penalty assessment under Section 203 was a derivative claim; it did not exist independently of the collective bargaining agreement, but was derived solely and exclusively from a determination that Respondent breached its collective bargaining agreement. Since this would have required interpretation or application of the collective bargaining agreement, the Superior Court correctly concluded that § 229 barred Petitioner's claim.

Labor Code Section 229 fosters the strong public policy of the State of California favoring arbitration. *Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 24 Cal. App.3d 35 (1972), *aff'd*, 414 U.S. 117 (1973). This policy follows the national labor policy promoting the resolution of labor disputes through the grievance-arbitration process. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). "A contrary rule which would permit an individual

employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. . . . [I]t would deprive employer and union the ability to establish a uniform and exclusive method for orderly settlement of employee grievances." Id. at 653. Thus, Section 229 does nothing more than state that employees covered by a collective bargaining agreement containing an arbitration clause must first exhaust their administrative remedies before resorting to court action, a statement of law which has already found approval before this Court. *Vaca v. Sipes*, 386 U.S. 171 (1967).

Petitioner claims that "the [Labor] Commissioner – as endorsed by the court – read § 229, the state legislature's pre-emption formula, to deprive any employee covered by a collective bargaining agreement of the protections of §§ 201 and 203." Petition at 10. This is an incorrect statement of the lower court decision. First, Petitioner's claim, which is the subject of this Petition, was his civil lawsuit filed in the Sacramento County Municipal Court. That case was not an appeal of a decision by the State Labor Commissioner and there was no ruling by the Labor Commissioner to which Petitioner objects. Second, the Municipal Court did not rule that the grievance-arbitration panel was precluded from addressing § 201 and § 203 issues. It said that Petitioner requested all applicable penalties under state and federal law in his grievance, but that "[federal and state penalties] in fact are not included or excluded by the CBA."[7] Petitioner's App. 3a.

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[7] This Court has recently confirmed that an employee may be compelled to arbitrate statutory claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991).

On its face, Labor Code § 229 cannot be read in the manner which Petitioner suggests. Nowhere does it state that wage payment issues under § 201 or "waiting time" penalties under § 203 cannot be handled in the grievance-arbitration setting. Petitioner's grievance included such claims, and there is no indication that the grievance panel did not consider these issues in resolving the entire grievance by awarding Petitioner overtime pay and denying his claims for a safety bonus, reinstatement and back pay, and federal and state penalties.

The holding of *Plumbing, Heating, and Piping Employers Council of Northern California v. Howard,* 53 Cal.App.3d 828 (1975) is not to the contrary. While dealing with a wage claim and not statutory penalties, the court held that the purpose and intent of § 229 was to promote the use of collectively bargained arbitration as a means to resolve wage disputes emanating out of a collective bargaining agreement. Section 229 establishes a fair procedure by which all employees can pursue their claims. No employee, whether or not covered by a collective bargaining agreement, is denied a forum to present his claim. Moreover § 229 does not deny employees any substantive right to claim wages or penalties, whether based on contract or statute. Petitioner would make the instant case one in which a grievance panel specifically ruled that it had no jurisdiction over a statutory penalty claim, leaving the employee no forum to adjudicate the claim. Someday that case may arise, but this is not it.

The decision of the Superior Court reflects an application of a valid state law to the facts of this case. The

standard set forth in California Labor Code § 229 exempting wage claims which require application or interpretation of a collective bargaining agreement containing an arbitration clause is valid and does not impinge upon Petitioner's federally protected rights. As in *Livadas*, however, Petitioner merely contends that the Superior Court's application of that standard to the facts of this case was erroneous. Petitioner asks this Court to second-guess the factual determinations made by the state court and conclude that, as a matter of law, the State Court erred in applying its own standards to the facts of this case. Such intervention into the province of state law was rejected by the Ninth Circuit in *Livadas*, 943 F.2d at 1145-1147, and should be rejected here.

## III. THE STATE COURT DECISION IS CONSISTENT WITH ESTABLISHED FEDERAL LABOR LAW PREEMPTION DOCTRINE

### A. The Decision Comports with Established Principles of Preemption under NLRA § 301, 29 U.S.C. § 185

Contrary to Petitioner's assertion, the decision of the Superior Court in this case reflects no "lingering confusion" in identifying when state claims are "intertwined with" or "independent of" labor agreements. Petition at 8, citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985). Instead, this is precisely the type of claim found subject to § 301 preemption under *Allis-Chalmers* and its progeny. In *Allis-Chalmers*, this Court held that an employee's state law tort action for bad-faith delay in

making disability payments due under a collective bargaining agreement was preempted under § 301, since the employer's duty to make timely payments in good faith could not be determined without consideration of its obligation to act in good faith in performing the contract. 471 U.S. at 215-19. The Court held that "only that result preserves the central role of arbitration in our 'system of industrial self-government.' " *Id.*, at 219 (citing *Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581 (1960)), and went on to list claims involving overtime pay among the "whole range of disputes traditionally resolved through arbitration," which must be preempted in order to avoid the possibility of restating such traditional contract claims as claims for breach of a good faith obligation under the contract. *Id.* Thus, this case, involving a claim for overtime wages and penalties under a collective bargaining agreement, falls squarely within the scope of § 301 preemption articulated by this Court.

Moreover, unlike *Livadas v. Aubry*, this case does not involve the issue of whether penalties under California Labor Code § 203 may be denied to an employee solely because he or she was covered by a collective bargaining agreement containing a grievance and arbitration clause. Instead, this case raises the issue of whether the state's standard of "willfulness," which requires an analysis of the employer's subjective good faith, may be applied to a disputed wage claim which was resolved by the grievance process contained in a collective bargaining agreement. Such state laws, which depend upon an evaluation of subjective criteria that implicate contractual obligations of good faith, generally cannot escape preemption. For example, Allis-Chalmers required an analysis of the

employer's "bad faith" in handling a disability claim under the contract. Similarly, the Ninth Circuit has determined that, while an employee's state law claim of handicap discrimination was not preempted, the same employee's claim for intentional infliction of emotional distress *was* preempted, since application of the state law standard for intentional infliction of emotional distress required the Court to consider the "reasonableness" of the employer's behavior which, the Court concluded, could depend on whether that behavior violated the collective bargaining agreement. *Miller v. AT&T Network Systems*, 850 F. 2d 543 (9th Cir. 1988).[8]

The Seventh Circuit has also concluded that state law claims alleging "willful" failure to pay wages when due are preempted under § 301. *National Metalcrafters v. McNeil*, 784 F. 2d 817 (7th Cir. 1986). Rejecting the notion that the state statute was a "minimum labor standard" subject to an exemption from preemption carved out in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), the Court concluded that the determination of whether the failure to pay vacation pay allegedly due under the collective bargaining agreement was "willful" required an interpretation of the parties' "good faith" conduct under the agreement, and was thus preempted.

This case does not involve a "minimum labor standard" of the type found exempt from preemption under

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[8] In contrast, this Court found no preemption of an employee's retaliatory discharge claim, where the claim could be resolved without reference to obligations under the collective bargaining agreement. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988).

the *Machinists* doctrine in *Metropolitan Life* and *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Both of those cases involved specific, non-discretionary benefits (mental health benefits and severance pay, respectively) guaranteed to all employees by state law, not a discretionary penalty imposed only on those employers whom the finder of fact determines have failed to act in "good faith" in satisfying their contractual wage obligations. The "good faith" standard of "willfulness" imposed by 8 Cal. Code Reg. § 13520 sets it apart form those state laws which impose "minimum labor standards" applicable to all employees, by requiring the Court (or Labor Commissioner) to undertake an evaluation of the employer's subjective good faith. Because the "good faith" of an employer signatory to a collective bargaining agreement is the subject of federal legislation, the California statute at issue in this case cannot be applied without reference to and interpretation of the collective bargaining agreement.

### B. The Decision is Consistent with the Prohibition Against State Interference with the Collective Bargaining Process Under *Garmon and Machinists*

While framed in terms of state law and preemption under NLRA § 301, 29 U.S.C. § 185, the Superior Court's decision is also constant with the principles of NLRA preemption set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). Under *Garmon*, a state may not regulate conduct which is arguably protected by § 7 of the NLRA, 29 U.S.C. § 157,

or arguably prohibited by § 8, 29 U.S.C. § 158, 359 U.S. at 244-45. Under *Machinists*, a state may not regulate the collective bargaining process, which is a matter Congress intended to leave unregulated. 427 U.S. at 152-53.

This case falls well within the scope of both aspects of NLRA preemption doctrine. Section 8(a)(5), 29 U.S.C. § 158(a)(5), of the NLRA prohibits an employer from refusing to bargain collectively with a union that is the representative of its employees. That duty includes an obligation to confer in good faith with respect to wages, hours and other terms and conditions of employment. NLRA § 8(d), 29 U.S.C. § 158(d). The duty to bargain in good faith extends throughout the life of a collective bargaining agreement, *Conley v. Gibson*, 355 U.S. 41, 46 (1957), and includes the duty to process employee grievances over wages and other terms and conditions of employment in a prompt and timely manner. *See, e.g., American Beef Packers, Inc.*, 193 NLRB 1117, 1119-20 (1971); *NLRB v. Southwestern Electric Cooperative, Inc.*, 794 F.2d 276 (7th Cir. 1986). This rule "prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited by or arguably prohibited by the Act. . . . The rule is designed to prevent 'conflict in its broadest sense' with the 'complex and interrelated federal scheme of law, remedy, and administration' . . . " *Wisconsin Department of Industry, Labor and Human Relations v. Gould*, 475 U.S. 282, 286 (1986). Thus, the rule prohibits a state from granting a remedy which has been withheld from the NLRB. *Id.* at 287.

Imposition of penalties under California Labor Code § 203 where, as here, the parties resolved the employee's claim for wages and penalties through the contractual grievance procedures, would be tantamount to finding that Respondent failed to act in good faith in its handling of the grievance and imposing a remedy not available to the NLRB. Such a determination would interfere with the "integrated scheme of regulation" adopted by Congress, *Garmon*, 359 U.S. at 247, and is therefore preempted.

Likewise, the imposition of state law penalties would be an impermissible intrusion into the collective bargaining process, which Congress intended to leave unregulated. *Machinists*, 427 U.S. at 147. Respondent's "good faith" under 8 Cal. Code Reg. § 13520 cannot be evaluated without examining the collective bargaining and grievance handling process itself. Under the facts of this case, any determination that no good faith dispute existed over Petitioner's wage claim would nullify the grievance resolution process agreed upon by the parties. Such a result would completely undermine the federal policy favoring arbitration of disputes arising under collective bargaining agreements. *Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578-81 (1960). Indeed, were this Court to grant the relief requested by Petitioner, employers would be discouraged from entering into collective bargaining agreements containing grievance and arbitration procedures, since they would be unable to rely on those procedures to resolve any wage disputes that may arise. Rather than foster the national policy favoring arbitration of employment disputes, this result would instead force employees to litigate every wage dispute – including those as minor as the $27.38 involved here – in state

court, thereby undermining the federal policy favoring quick and economical resolution of employment disputes.

Contrary to Petitioner's assertion, the decisions of the Fourth, Eighth and Ninth Circuits do not create any conflict requiring resolution by this Court. In *Rum Creek Coal Sales v. Caperton*, 971 F. 2d 1148 (4th Cir. 1992), the Fourth Circuit held that the state's denial of basic police protection to an employer's property during a violent labor dispute violated the employer's right to withstand a strike by providing unjustified support to the strikers, thus undermining the policy favoring free interplay of economic forces set forth in *Machinists* and *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103 (1990); 971 F.2d at 1153-54. Conversely, in *Steelworkers v. Johnson*, 830 F. 2d 924 (8th Cir. 1987), the Eighth Circuit held that the denial of unemployment benefits to striking employees on the basis of union membership violated the employees' rights guaranteed by § 7 of the NLRA, 29 U.S.C. § 157; 830 F.2d at 929.

Neither *Livadas* nor this case conflicts with these decisions. In *Livadas*, the Ninth Circuit held that the California Labor Commissioner's policy of declining jurisdiction over wage claims that concern the application and interpretation of a collective bargaining agreement, as required by state law, was valid and concluded that an employee does not have a federally protected right to a correct application of that state standard to a given set of facts. 943 F. 2d at 1146. Moreover, even if the issue in *Livadas* were framed, as suggested by Judge Kozinski's dissent, as whether the Labor Commissioner's policy deprived the employee of her rights under § 7 of the

NLRA, 29 U.S.C. § 157, it does not conflict with the decisions of the Fourth and Eighth Circuits relied upon by Petitioner herein. Neither *Rum Creek* nor *Steelworkers v. Johnson* involved the analysis of the parties' conduct under the terms of a collective bargaining agreement, but instead dealt only with the denial of benefits based upon a party's involvement in a labor dispute. Thus, the decisions are readily distinguishable on their facts and issues presented.

Granting Petitioner's demand that this Court supplant the grievance and arbitration process with its own evaluation of the employer's handling of Petitioner's wage claim would irreparably destroy the primacy of resolution of labor disputes through arbitration upon which federal labor policy rests. Rather than fostering cooperation between management and labor, allowing employees such as Petitioner to sidestep the available grievance processes and sue their employers in court would turn every wage dispute under a collective bargaining agreement into a state court lawsuit, depriving the parties of the right to negotiate their own means of dispute resolution. Such a result is plainly contrary to the purposes of the NLRA, and should not be considered by this Court.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: OCTOBER 18, 1993

Respectfully submitted,

COOK, BROWN, REDIGER & PRAGER
DENNIS B. COOK*
DOROTHY BACSKAI EGEL
*Counsel of Record
*Attorneys for Respondent*

## APPENDIX

### DECLARATION OF ED STUART

I, Ed Stuart, hereby declare and state:

1. I am the business agent for the National Independent Union (NIU) which is signed to a collective bargaining agreement with LFC Power Systems Corporation for the Greenleaf I project located in Yuba City, California. This collective bargaining agreement covers the work of all electricians on this jobsite.

2. John J. Hart was an electrician that worked under the terms and conditions of this agreement on this jobsite for LFC Power Systems Corporation. Mr. Hart sent a letter to me, a copy of which is attached hereto and incorporated herein, marked Exhibit 1, in which he stated that he was owed overtime wages and safety bonus monies, and that he was wrongfully discharged. Based upon this letter, I wrote up a grievance, which is also attached hereto and incorporated herein by reference, marked Exhibit 2. This grievance was discussed with LFC Power Systems Corporation and the National Electrical Contractors Association, Sacramento Valley Chapter (NECA), which is also signatory to the collective bargaining agreement. All of these issues were discussed, and it was concluded that the company owed Mr. Hart approximately $37 to fully and completely resolve all the issues that arose in the grievance.

3. I have read the foregoing declaration and declare under penalty of perjury that it is true and correct and if

called upon to testify, would testify the same. Dated this 13th day of December 1988 in Elk Grove, California.

/s/ Ed Stuart,
Ed Stuart, Business Agent, NIU

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EXHIBIT 1

[Handwritten Original]

PREPARED BY J. HART
DATE 9-10-88

WED. Aug. 24 – Company holds evaluations and in conference with Don ——— (supervisor) and Bill Butterfield (superintendent) Bill suggests that I come in half hour early to study the prints and get orgainized. [sic] I agreed it would make my job easier. Bill said he would pay me the overtime and for me to start coming in a half hour earlier.

THURS. I report to work at 6:30 work until 3:30 – 8½ hrs.

FRI. I report to work at 6:30 work until 3:30 – 8½ hrs. Dutch Holland asks me if I would like to have a conference with 3 other workers to hash out our differences which had been causing grief on the jobsite. I told him I would like to have such a conference and asked to have Don ——— present as he apparently had told these other workers a different story than he told. Dutch Holland came back from the office later that afternoon and told me that the confrence [sic] had been denied.

MON. Aug. 29

I reported to work at 6:30 and was told to report to the trailer at 10:15. I was discharged by Don ———. I asked why I was being fired. Don could not come up with a reason. I requested my safety bonus of $100.00 that had been promised me. I also pointed out that my check was short and that they owed me for a half hour overtime on Thursday and Friday. [Aug 26, 27]. Don said he would get it straightened out and mail me a check. I have not received such check. So I am filing this greivence [sic]. I feel that I have been wrongfully discharged and that I am owed 127.37 in wages. I request that I be reinstated in my job and that I be given back-wages and all applicable penalties under state & federal law.

/s/ J. Hart

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EXHIBIT 2

[Partially Handwritten Original]

Date 9-[illegible]-88

SENT TO: _____

BUSINESS REPRESENTATIVE: Edgar L. Stuart

GRIEVANCE

Employee's Name John Hart

Home Address 376 Lexington Ave, San Francisco CA 94110

Firm Name L.F.C. 5087 Township Rd. Yuba City Headquarters _____ Date Grievance occurred Aug. 29, 1988 Time 10:15 am Foreman or Supervisor Don Shop Steward _____ Has this been taken up with the shop steward? ____ When? _____ Nature of Grievance Wrongfully discharged settlement requested, John Hart be re-instated and be made whole for all wages including safety bonus – and penalty pay, under federal and state law. Signature of Employee _____ Date _____ Results of Discussion between Shop Steward and Supervisor: _____ Signature of Shop Steward _____ Date _____ Remarks _____

Use back of this sheet for additional information.